IN THE

Supreme Court of the United States

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October Term, 1967
No. 358

IGNAZIO INTRAVAIA and I & I TRUCKING, INC.,
Petitioners,

vs.

W. WILLARD WIRTZ, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on March 15, 1967.

Citations to Opinion Below.

The Memorandum Opinion of the Trial Judge of the United States District Court, Southern District of California, Centra Division, who originally took the evidence in this case, the Honorable Harry C. Westover, is printed in Appendix A hereto, *infra*, App. p. 1. The opinion of the United States Court of Appeals for the Ninth Circuit, which said opinion was filed on

March 15, 1967 is printed in Appendix B hereto, *infra*, App. p. 6. To the knowledge of attorney for the petitioners, the opinion of the United States Court of Appeals for the Ninth Circuit has not yet been reported in any Federal Reporter.

Jurisdiction.

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on March 15, 1967. The jurisdiction of this court is invoked under 28 U.S.C. Section 1254(1).

Question Presented.

Are petitioners' employees engaged in the production of goods for commerce within the provisions of the Fair Labor Standards Act, 29 U.S.C. Sections 207, *et seq.* where the activities of the employees are entirely within the State of California and consist solely, in the transportation, entirely Intrastate, of rock, sand, gravel or coment to interstate facilities or to public streets which connect to interstate freeways?

Statutes Involved.

29 U.S.C. Sections 201 *et seq.* The sections are printed in Appendix C *infra*, App. pp. 16-55.

Statement.

This action was brought by W. Willard Wirtz, Secretary of Labor, United States Department of Labor, seeking to enjoin alleged violations by petitioners of over-time and record keeping requirements of the Fair Labor Standards Act, 29 U.S.C. Sections 201 *et seq.* The action proceeded upon an Amended Complaint

[C. T. pp. 89-91]. In Paragraph III of Respondent's Amended Complaint, it is alleged:

> "Defendant Ignazio Intravaia . . . employs about twenty-six employees who are engaged in the production of sand, gravel and cement for commerce. Defendant is a corporation . . . where, since subsequent to January, 1964, it has employed an undetermined number of employees who are engaged in the production of sand, gravel and cement for commerce." [C. T. p. 90].

The Amended Complaint further alleges in Paragraph IV thereof,

> "Defendants repeatedly have violated and are violating the provisions of Sections 7 and 15(a)-(2) of the Act by employing many of their employees in the production of goods for commerce etc . . ." [C. T. p. 90].

The Amended Complaint prayed for a permanent injunction enjoining petitioners, and each of them, from violating the provisions of Sections 15(a)(2) and 15-(a)(5) of the Act [C. T. p. 90].

For purposes of brevity, throughout this brief Ignazio Intravaia and I & I Trucking, Inc., will be referred to as "petitioners"; W. Willard Wirtz, Secretary of Labor, United States Department of Labor will be referred to as "respondent"; the Fair Labor Standards Act of 1938, 29 U.S.C. Sections 201 *et seq.* will be referred to as the "Act" unless specific reference to a particular section thereof is made.

Since respondent's injunction is sought under a Federal Statute, to wit: "The Act", it is pertinent to point out which statutory provisions are applicable upon

Angeles County, and the cement was picked up at a cement plant in either Riverside or San Bernardino Counties—all wholly within the Southern California area.

Congress did not intend the Fair Labor Standards Act should apply to *all* employees—even those remotely connected with interstate commerce. *Walling v. Goldblatt Bros., Inc.,* 128 F.2d 778. Plainly, on the contrary, it was the intent of Congress that the Act should apply to only those employees engaged in commerce or in the production of goods for commerce. *McLeod v. Threlkeld,* 319 U.S. 491.

In the case at bar there is no contention that defendants in any manner *produced* the "goods" or materials transported. The only issue in this case is whether the truck drivers were "engaged in commerce." In McLeod, supra, the Court said, at page 493

> "* * *. In the Fair Labor Standards Act, Congress did not intend that the regulation of hours and wages should extend to the furthest reaches of federal authority. The proposal to have the bill apply to employees 'engaged in commerce in any industry affecting commerce' was rejected in favor of the language, now in the act, 'each of his employees who is engaged in commerce or in the production of goods for commerce.' §§ 6 and 7. See the discussion and reference to legislative history in Kirschbaum Co. v. Walling, 316 U.S. 517, and Walling v. Jacksonville Paper Co. 317 U.S. 564. The selection of the smaller group was deliberate and purposeful."

Respondent takes the position that since the word "produced" includes transportation, any act of transportation would be an activity under which a court could properly find coverage under the "Act". A careful review of the statutory definition of "produced" makes it clear, however, that respondent is urging a distorted construction of the word "transported" consistent neither with accepted grammatical construction, the rule of *Ejusdem Generis,* nor the definition of transported as that phrase has been commonly understood.

Trial of this case was held in the courtroom of the Honorable Harry C. Westover, Judge Presiding, United States District Court, Southern District of California, Central Division on October 6th, 7th and 8, 1965. Evidence, both oral and documentary was had, briefs were filed and the matter was submitted. On November 23, 1965, Judge Westover ruled for the defendants and filed a Memoranum Opinion in which he arrived at the conclusion that plaintiff below (Wirtz) had failed to establish coverage under the provisions of the Fair Labor Standards Act. Notice of Appeal was filed on February 11, 1966. The judgment below was appealed to the United States Court of Appeals for the Ninth Circuit, arguments on appeal were had on October 5, 1966 and on March 15, 1967 the United States Court of Appeals for the Ninth Circuit the Honorable Justices Barnes, Duniway and Ely reversed the conclusions of the trial court and found that petitioners' employees were covered under the Fair Labor Standards Act.

Reasons for Granting the Writ.

1. The decision of the United States Court of Appeals for the Ninth Circuit relied heavily on the companion cases of *Alstate Const. Co. v. Durkin,* 1953, 345 U.S. 13, and *Thomas v. Hempt Bros.,* 1953, 345 U.S. 19. Upon the rationale of those cases, the United States Court of Appeals ruled that petitioners' employees were engaged in the production of goods for commerce, in reliance upon Section 203(j) of the Fair Labor Standards Act, 29 U.S.C. Sections 201 *et seq.*

We respectfully point out to the United States Supreme Court that the United States Court of Appeals has completely misread and misjudged the rationale of both *Alstate Const. Co. v. Durkin,* 1953, 345 U.S. 13 and *Thomas v. Hempt Bros.,* 1953, 345 U.S. 19. As pointed out in petitioners' brief below, in both the *Alstate* case and the *Thomas v. Hempt Bros.* case, *supra,* the employees involved both actively produced, then transported the commodities involved used in the construction of interstate highways. In the instant case, it was a stipulated fact that petitioners' employees produced nothing.

If the decision of the United States Court of Appeals in the instant case is not reviewed by the United States Supreme Court the question of whether transportation, entirely within the confines of a State, alone, constitutes the production of goods in interstate commerce within the meaning of the Fair Labor Standards Act remains in dispute and will be a constant source of controversy within the various United States District Court Circuits.

The United States Supreme Court is respectfully reminded that *Alstate v. Durkin,* the principal authority

relied upon by the United States District Court of Appeal in reversing the trial judge in the instant case, was a five to four decision productive of great controversy amongst the members of the United States Supreme Court even though, in the *Alstate* case, the employees both PRODUCED, then transported the commodities in question.

Further, the opinion of the United States Court of Appeals is not only inconsistent with the opinion of the United States Supreme Court in *Alstate Constr. Co. v. Durkin,* 1953, 345 U.S. 13, but represents a distortion of that opinion for purposes of affording unlimited coverage under the Fair Labor Standards Act and, therefore, is in direct violation of the opinion of the United States Supreme Court in *McLeod v. Threlkeld,* 319 U.S. 491, 87 L. Ed. 2d 1538, 63 S. Ct. 1248.

It has consistently been held that transportation alone not accompanied by any act of production does not afford coverage under the Fair Labor Standards Act.

United States v. Darby (1941), 312 U.S. 100, 85, L. Ed. 609, 61 S. Ct. 451;

E. C. Schroeder v. Clifton (1946), (Circuit Court of Appeals, Tenth Circuit), 153 F. 2d 385;

Walling v. Craig (1943), 53 F. Supp. 470;

Higgins v. Carr Bros. (1943), 317 U.S. 572, 63 S. Ct. 337;

Cederblade v. Parmelee Transportation Co., D.C. 111, 1947, 94 F. Supp. 965, aff'd 166 F. 2d 554;

Wirtz v. Dunmire (D.C.L.A. 1965), 239 F. Supp. 374;

Mateo v. Auto Rental Co., (C.A. Hawaii 1957), 240 F. 2d 831.

2. The question presented is of importance not only in the administration of the Fair Labor Standards Act but in advising a local trucking industry of its obligations under a Federal statute intended in its enactment to apply only to production of goods that moved in interstate commerce. The United States Supreme Court, in *McLeod v. Threlkeld* (1942), 319 U.S. 491, 87 L. Ed. 1538, 63 S. Ct. 1248, held that in enactment of the Fair Labor Standards Act Congress did not intend that the regulation of hours and wages should extend to the furthest reaches of Federal authority but, on the contrary, that the Fair Labor Standards Act had limited rather than unlimited coverage. In that opinion, the United States Supreme Court held that coverage under the Fair Labor Standards Act was not coextensive with the fullest power of Congress to regulate interstate activity.

Settlement of the question by the United States Supreme Court is plainly in the public interest since the opinion of the United States Court of Appeals in the instant case would seem to imply that every local activity involving an act of transportation becomes "production of goods in interstate commerce" within the meaning of the Fair Labor Standards Act. We ask the United States Supreme Court to bear in mind that all of the activities of petitioners herein were stipulated to be activities entirely within the confines of the State of California. Settlement of this question is further in the public interest in that it appears to petitioners that the United States Court of Appeals has acted in a legislative function rather than judicial function in ruling in this case for the decision has now expanded the coverage of the Fair Labor Standards Act to acts of transportation alone unconnected with the production of

goods. The decision of the United States Court of Appeals has opened a Pandora's box from which will spring findings of coverage as to every conceivable local activity. It is submitted that Congress, in its enactment of the Fair Labor Standards Act, clearly intended that coverage could be found only if petitioners' employees were engaged in the production of goods for commerce, 29 U.S.C. Section 201.

3. The decision of the court below is believed to be erroneous, and in direct conflict with not only *Alstate Const. Co. v. Durkin* (1953), 345 U.S. 13; *Thomas v. Hempt Bros.* (1953), 345 U.S. 19, but with *McLeod v. Threlkeld,* 319 U.S. 491, 87 L. Ed. 2d 1538, 63 S. Ct. 1248; *A. B. Kirschbaum Co. v. Walling* (1942), 316 U.S. 517, 86 L. Ed. 1638, 62 S. Ct. 1116; *Higgins v. Carr Bros.* (1943), 317 U.S. 572, 63 S. Ct. 337, and *United States v. Darby* (1941), 312 U.S. 100, 85 L. Ed. 609, 61 S. Ct. 451. The evidence in this case is overwhelming and uncontradicted that there was not transportation in interestate commerce whatsoever but simply acts of transportation which occurred entirely within the confines of the State of California.

It is well settled and fundamental in our jurisprudence that extension of coverage under a Federal statute enacted by the Congress of the United States is in the hands of legislature, not in the courts. It is submitted that the United States Court of Appeals not only misapplied the law but exceeded its authority in distorting and elaborating and enlarging unnecessarily the scope of coverage under the Fair Labor Standards Act so that now it would seem to embrace every conceivable local activity, rendering meaningless the power of the states to regulate local trucking activities.

The trial court below who heard this evidence ruled that there was no coverage. The United States Court of Appeals who did not review the evidence, did not comment on the evidence and indeed, pointed out in its opinion that the evidence was undisputed applied the evidence in this case to the law in a manner completely inconsistent with previous opinions of the United States Supreme Court. Petitioners submit that the function of the United States Court of Appeals, whether it be in the Ninth Circuit or any other Circuit of the United States, is to review the judgment of the trial court below for error only not to make new law in the furtherance of its own private concept of social justice.

Conclusion.

For the foregoing reasons, and each and every one of them, and in the interest of justice, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

MERRILL ALBERT,
Counsel for Petitioners.

APPENDIX A.

Memorandum Opinion.

United States District Court, Southern District of California, Central Division.

W. Willard Wirtz, Secretary of Labor, United States Department of Labor, Plaintiff, vs. Ignazio Intravaia and I & I Trucking, Inc., Defendants. No. 63-1318-HW.

Defendants are truckers; in the action at bar they are alleged to have hauled rock, sand and gravel, and cement from the place of production to various contractors engaged in constructing, repairing or rebuilding streets, roads and highways which lead directly or indirectly onto interstate highways.

Defendants' activities with reference to cement hauling consisted of driving a truck to a cement plant where the cement was loaded in bulk onto trucks owned by defendants; and the trucks were then driven to the job sites where the cement was dumped into a reservoir or container for subsequent use by the construction contractors in street and highway work.

The rock, sand and gravel were picked up by defendants' trucks at the place of origin, hauled by defendants' truckers to the contract sites and were dumped at the job site according to directions received by the truck drivers.

Defendants had no interest whatsoever in the cement, rock, sand and gravel except to see these items were transported from the place of origin to the place of use.

In addition to hauling to streets and highways job sites defendants trucked material to the March Field

Air Force Base where the transported materials were used in repairing or rebuilding runway surfaces. Again, defendants' sole interest in the materials hauled was transportation thereof from source of origin to the place of use.

The United States Supreme Court has held that employees repairing or building interstate highways are "engaged in commerce." Evidence in the case at bar discloses that all the streets and highways upon which work was performed with materials hauled by defendants' trucks were directly or indirectly connected with interstate highways.

Defendants did not pay truck drivers on an hourly or daily basis. Instead, defendants gave to the individual truck driver a very substantial part of the amount received for trucking each load of material. As a consequence, records were not kept showing the number of hours necessary for each trip, and defendants did not compensate drivers for work performed in excess of forty hours in any one week.

Contending defendants were not complying with the Fair Labor Standards Act, plaintiff filed this action to enforce compliance. Defendants deny that they come within the provisions of the Act.

Plaintiff relies upon *Alstate Construction Co. v. Durkin, etc.*, 345 U.S. 13, in which the Supreme Court was called upon to decide whether a road construction company engaged in the repair of roads, railroads and similar facilities within the State of Pennsylvania was within the coverage of the Fair Labor Standards Act. From the Alstate holding, we must conclude that employees of a contractor engaged in repair of roads and

highways connected with an interstate system come within the provisions of the Act.

In the case now before the court, however, the government is asking that coverage go one step further. It asks that this court hold not only will employees working upon roads, streets, and highways be covered but also within the coverage of the Act are employees of a trucking company which does no more than pick up and deliver materials to he job site for "covered" employees to use in their work.

This issue is discussed in the dissenting opinion of Alstate, supra, as follows (page 17)

> "The Court reasons that if the man who is building or repairing an interstate highway is 'engaged in commerce,' the one who carries cement and gravel to him from a nearby pit is 'engaged in the production of goods for commerce.' * * *."

The case at bar seems to be of first impression in the Ninth Circuit. The intrastate transportation industry of Southern California has been in existence in excess of fifty years and has not yet been held to be within the purview of the Fair Labor Standards Act.

If the employee-haulers in question here had been hired by the various contractors performing the actual street and highway work, or the runway work at March Field, this Court would have no hesitancy whatsoever in holding they came within the Act's coverage.

But the record before the Court shows all hauling involved here was for work performed upon streets and highways within the County of Los Angeles and upon the March Field runways in the County of Riverside; the rock, sand and gravel hauled were picked up in Los Angeles County for delivery to job sites in Los